No. 89-1520

In The

Supreme Court of the United States

October Term, 1989

COOK INLET TRIBAL COUNCIL, C.A.A. and C.M.F.,
A Tribal Indian Mother and Her Minor Child,

Petitioners,

v.

CATHOLIC SOCIAL SERVICES, INC., C.G. and S.G.,

Respondents.

On Petition For A Writ Of Certiorari To The
Alaska Supreme Court

MISSISSIPPI BAND OF CHOCTAW INDIANS' [redacted] BRIEF AS AMICUS CURIAE AND BRIEF OF MISSISSIPPI BAND OF CHOCTAW INDIANS, AMICUS CURIAE, IN SUPPORT OF PETITIONER

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MISSISSIPPI BAND OF CHOCTAW INDIANS' MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Mississippi Band of Choctaw Indians moves this Court for leave to file this brief as Amicus Curiae in support of the Petitioners, Cook Inlet Tribal Council, C.A.A. and C.M.F.

The Mississippi Band of Choctaw Indians is a federally recognized tribe duly organized pursuant to Section

16 of the Indian Reorganization Act of 1934, as amended, 48 Stat 986, 25 U.S.C. § 467.

The written consent of counsel for respondents has been requested. No reply having been received, amicus hereby file this motion for leave to file brief *amicus curiae* pursuant to Rule 37.2 of the Rules of the Court. If written consent of counsel for respondents is subsequently obtained, such consent shall be filed with the Court.

There are questions of fact and law which have not been presented, nor are they likely to be adequately presented by the parties, but are relevant to the disposition of the case. The case presents issues the resolution of which is likely to have general application to all Indian tribes. The interest of amicus in this case is as follows:

1. Mississippi Band of Choctaw Indians has a continuing interest in asserting the jurisdictional principles enunciated in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. ___ (1989), the efficacy of which may well be undermined if the decision of the Alaska Supreme Court is allowed to stand.

2. Amicus Mississippi Band of Choctaw Indians, as the prevailing party in the *Holyfield* case, regards the question of notice in consensual child custody proceedings as having been addressed and decided by this Court in a manner contrary to the ruling of the Alaska Supreme Court in this present litigation.

3. Amicus Mississippi Band of Choctaw Indians plans to address principles of preemption in Indian law, interpretation of federal statutes affecting Indian tribes, interpretation and application of

the term "notice" in federal statutes, and potential prospective applications of state adoption laws as they affect interpretation of the Indian Child Welfare Act in a manner different than those questions will be addressed by petitioner, Cook Inlet Tribal Council, et. al.

4. Differences present and prospective between adoption laws of the State of Alaska and of the State of Mississippi pose variations on the impact and the potential impact of the decision of the Alaska Supreme Court of vital importance which may not be adequately raised by petitioners.

For the foregoing reasons the Mississippi Band of Choctaw Indians hereby seek leave of the court to file the attached *Amicus Curiae* brief.

Dated this the 27 day of April, 1989.

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BRIEF OF AMICUS CURIAE

INTEREST OF AMICUS CURIAE

Amicus curiae has a substantial interest in this case as a federally recognized Indian tribe with a governing body and court system. Twice in the last dozen years amicus tribe has had resort to this Court for recognition of its special federal and tribal jurisdiction free from state court incursions. See, e.g. *United States v. John*, 437 U.S. 634 (1978); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. ___ (1989).

The issues raised in this case threaten the efficacy of tribal court jurisdiction this Court earlier recognized in litigation of the Mississippi Band of Choctaw Indians in adoption cases involving children eligible for tribal membership. The tribal jurisdiction and tribal membership of amicus will be affected by the decision in this case.

SUMMARY OF ARGUMENT

This Court in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. ___ (1989), blocked applications of state judicial redefinitions of the terms "residence" and "domicile" by Mississippi courts where they would otherwise defeat an ICWA provision conferring exclusive tribal court jurisdiction over reservation tribal children. Now a ruling of the Alaska Supreme Court *sub judice* would defeat the ICWA rights safeguarded by the *Holyfield* decision through its holding that an Indian child's tribe is not required to be provided notice of consensual state court terminations of parental rights and subsequent adoptions into non-Indian homes. The Alaska Supreme Court ignores the preemptive provisions of ICWA to attain a result otherwise worked by state law in adoptions of non-Indians.

The right-of-intervention but no-right-to-notice netherworld produced by the Alaska Supreme Court's construction of the ICWA produces unworkable and unconscionable results for Indian tribes and Indian children nationwide. On the one extreme the decision strips tribes of the initial triggering mechanism for enforcement of fundamental tribal rights in their children conferred by

ICWA and recognized by this Court in *Holyfield*. On the other hand the ICWA in staged intervals empowers tribes and the Secretary of the Interior to learn generally of state placements and adoptions immediately following court action; and then at age 18 the Indian children themselves may acquire full specific information on the tribal identity of their biological parents and other information. The Alaska ruling in the face of ICWA's other right to information provisions extends the potential for tribal intervention to set aside void adoptions for many years and lends a sense of impermanancy to all consensual ICWA adoptions.

The recognitions gained by amicus in *Holyfield* would be phyrric if the decision below were allowed to stand; tribal right of intervention without concomittant right to notice would be meaningless. Amicus urges summary reversal; alternatively, amicus urges granting of *certiorari* review.

ARGUMENT

One year ago in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. ___ (1989), the Court in recognizing and upholding the broad purposes and protections of the Indian Child Welfare Act of 1978 (ICWA), 92 Stat 3069, 25 USC §§ 1901-1963, recognized at fn. 12:

> The ICWA specifically confers standing on the Indian child's tribe (as well as the child and its parents) to petition a court to invalidate any foster care placement or termination of parental rights under state law "upon a showing that such action violated any provision of sections

> 1911, 1912, and 1913" of the ICWA. See also § 1911(c) (Indian child's tribe may intervene at any point in state-court proceedings for foster care placement or termination of parental rights). "Termination of parental rights" is defined in § 1903(1)(ii) as "any action resulting in the termination of the parent-child relationship."

Despite this Court's recognition above, the Alaska Supreme Court now holds that Indian tribes are not entitled to notice of state proceedings for voluntary termination of a tribal mother's parental rights to her Indian child for ultimate adoption into a non-Indian home. Application of the result the Alaska Supreme Court's construction of ICWA would work produces a legal conundrum of bizarre consequences and should be reversed.

The Alaska Supreme Court inferentially postulates a no-tribal-right-to-notice on protecting the confidentiality interests of the biological and adopting parents in voluntary proceedings in state court. Its reliance upon the confidentiality otherwise ensured pursuant to Alaska Stat. 25.23.150, however, is simply not appropo in ICWA cases for a number of reasons.

Section 105 of the Act, 25 USC § 1915, provides, for instance:

> (e) A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

Clearly, ICWA expressly entitles tribes and the Secretary of the Interior to general knowledge of state adoptive placements and they become entitled to this information at a minimum at least immediately following state proceedings.[1]

Section 107 of the Act, 25 U.S.C. § 1917, provides furthermore that an Indian subject of an adoptive placement, upon turning eighteen, shall on application be informed by the court which entered final decree of the tribal affiliation, if any, of the individual's biological parents and of such other information as may be necessary to protect any rights flowing from the individual's tribal relationship. Thus a second mechanism has been created for acquiring awareness of adoptions and thereafter of jurisdictional defects which may have rendered the original proceeding void.[2]

In another area, Section 103, 25 USC § 1913(d), gives Indian parents two years after the entry of a final state decree of adoption to withdraw consent where obtained through fraud or duress, to petition to vacate such decree, and to have such decree vacated and the child returned.

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[1] A tribe or the Secretary could, for instance, file a standing request pursuant to § 1915(e) with each state for records of any placement immediately upon its being reported. Undoubtedly the Secretary or at least a number of tribes will make such a filing if this case is allowed to stand.

[2] A premium might, in instances, inure to the child if the biological parent had since deceased and a substantial inheritance or simply an entitlement to Social Security death benefits might thereby arise. In some tribal affiliations, Indian claims judgments monies, per capita payments, headrights or land apportionments might also provide economic incentives.

A measure of non-finality is thereby added which is not normally present in other state adoptions.

The collective result of ICWA is, unlike other state adoptions of non-Indians, to remove from absolute secrecy the existence of the proceedings themselves and to make state adoptions more subject to being set aside under certain circumstances. Therefore, the inescapable effect under Alaska's construction would in many instances only be to postpone critical outside analysis of ostensibly concensual adoptions by parties with standing other than the natural and adoptive parents.

To read, as does the Alaska Supreme Court, that notice to the tribe is not required during the actual pendency of the adoption while the ICWA specifically confers standing on the Indian child's tribe to participate in child custody adjudications and expressly requires reportings pursuant to § 1915(e) works a cruel result, encourages multifarious litigation and disregards the need for judicial economy.

This court, paraphrasing from *In re Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz, at 204, 635 P2d, at 189, in the *Holyfield* decision, concluded "we must defer to the experience, wisdom, and compassion of the [Choctaw] tribal courts * * *." 490 US at ___.[3] Where state courts are either unable or unwilling to transfer jurisdiction to tribal forums, due process minimally requires

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[3] Vivian Holyfield's adoption petition in tribal court was granted February 9, 1990. W.J. and the twins were ordered to undergo HLA-blood typing and based on the results W.J.'s alleged paternity was absolutely disproved.

notice to tribes in order that statutory rights of intervention may be exercised.

CONCLUSION

For the reasons stated in this brief, the Mississippi Band of Choctaw Indians requests that this Court either summarily reverse the decision of the Alaska Supreme Court or vacate and remand the case for further proceedings consistent with *Mississippi Band of Choctaw Indians v. Holyfield* and Section 1911(c). Alternatively, amicus respectfully requests that Petitioners' petition for a writ of certiorari be granted.

Respectfully submitted,

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April 27, 1990